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FILED
FROM OVERNIGHT BOX

DEC 26 2000

KEVIN E. O'BRIEN
UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

8 **IN THE UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF ARIZONA**

10 In re:

11 CHARLES THOMAS BROWN d/b/a TOM
12 BROWN PREFERRED TRUST
13 COMPANY,

14 Debtor.

15 MAUREEN GAUGHAN, Chapter 7 Trustee

16 Plaintiff,

17 v.

18 ANN AKAMINE, et al.,

19 Defendants.

In Proceedings Under Chapter 7

No: B97-14228 PHX GBN

Adv. 99-746

**MOTION TO ALTER OR AMEND
JUDGMENT AND FOR NEW TRIAL**

20 Patrick O'Connor, through undersigned counsel, hereby moves to alter or amend the "Final
21 judgment against Patrick O'Connor' and "Order Granting Trustee's Motion for Partial Summary
22 Judgment", each entered on December 15, 2000, and grant a new trial pursuant to Bankruptcy
23 Rules 8002(b) and 9023.

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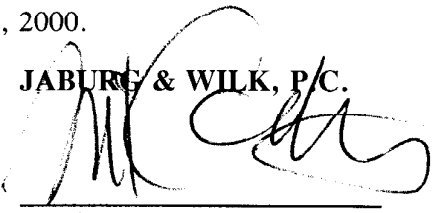
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1 This Motion is supported by the following Memorandum of Points and Authorities, incorporated
2 herein by this reference.

3 DATED this 26th day of December, 2000.

4 JABURG & WILK, P.C.

5 
6 Randy Nussbaum
7 Michael E. Gottfried
8 Attorneys for Pat O'Connor

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 The duly appointed Chapter 7 Trustee in the above-captioned matter filed a Complaint
11 against Patrick O'Connor seeking, among other things, to recover a preference of \$37,800.00
12 pursuant to 11 U.S.C. § 547, a fraudulent transfer pursuant to A.R.S. § 44-1004.A.1 in the amount
13 of \$66,826.00 and to disallow any claims that have or may be filed in this bankruptcy case by Mr.
14 O'Connor. The Court granted the Trustee's Motions for Partial Summary Judgment and entered
15 a final judgment against Mr. O'Connor concerning the preferential payment claim. However, the
16 relief requested by the trustee is not consistent with the orders submitted to the Court.

17 **I. THE FINDING THAT BROWN'S DEFENSES TRANSFERS TO O'CONNOR WERE**
18 **MADE WITH THE "INTENT TO HINDER, DELAY OR DEFRAUD HIS CREDITORS"**
DOES NOT PRESERVE O'CONNOR'S DEFENSE FRAUDULENT TRANSFER.

19 The Court has entered an order finding that the transfer of \$66,826.00 to Patrick O'Connor
20 was a fraudulent transfer under A.R.S. § 44-1004.A.1. In his reply concerning the motion for
21 summary judgment, the Trustee, at page 3, lines 14-18 and page 4, line 1, indicates that by this
22 finding "Mr. O'Connor is not precluded from raising this defense [that he paid more than he
23 received] to the fraudulent transfer. . . . The Trustee is not seeking, at this time, to cut off any
24 potential defense that Mr. O'Connor might raise to the fraudulent transfer if he can establish that
25 he invested more with Brown than he received and had he received the transfer in good faith".
26 Unfortunately, this finding does have the practical effect of cutting off this defense.

27 In essence, the Court could only make a finding that the money was transferred "with actual
28 intent to hinder, delay or defraud any creditor of the debtor" after it concluded that no fair

1 consideration was paid and that Mr. O'Connor had knowledge of the Debtor's fraudulent intent and
2 the intent on the part of Mr. O'Connor to assist the debtor in his fraudulent purpose. *See,*
3 *generally, Wallin v. Scottsdale Plumbing Co., Inc.* 27 Ariz. 591, 557 P.2d 190 (1976) (fair
4 consideration irrelevant and there was knowledge on part of grantee or grantor as fraudulent intent
5 and intent on part of grantee to assist grantor in his fraudulent purpose). A.R.S. § 44-1004.B lists
6 11 non-exclusive factors that the Court may determine in seeking to evaluate whether actual intent
7 to hinder, delay or defraud creditors is present. One of these factors is whether the value or the
8 consideration received by the Debtor was reasonably equivalent to the value of the asset transfer
9 with the amount of obligation incurred. A.R.S. § 44-1004.B.8. This is a fact to be used in
10 evaluating whether such actual intent was present - once actual intent is found, as in the Court's
11 order, there is no reason to evaluate the factors listed in section B. Thus, the potential defense of
12 payment that the Trustee argued was being preserved is, in fact, cut off by the conclusion contained
13 in the order finding a fraudulent transfer under Section 44-1004.A.1.

14 Accordingly, it is respectfully requested that the Court grant a new trial on the issue of
15 fraudulent transfer as this defense, and the other defenses under A.R.S. § 44-1004(B) sought to be
16 preserved by the Trustee have not been preserved under the terms of the "Order Granting the
17 Trustee's Motion for Partial Summary Judgment" or, alternatively, amend such order to delete
18 paragraph 5(e) until such defenses are evaluated.¹

19 **II. MR. O'CONNOR'S CLAIM SHOULD NOT BE DISALLOWED IN ITS ENTIRETY.**

20 The "Order Granting Trustee's Motion for Partial Summary Judgment" disallows Mr.
21 O'Connors claim without limitation. In the Trustee's reply, however, the Trustee seeks to disallow
22 Mr. O'Connor's claim under Section 502(d) "unless and until they satisfy the judgment against
23 them". *See* Trustee's Reply at Page 10, lines 1 through 4. The order submitted by the Trustee
24 contains no such contingencies. Accordingly, it is respectfully requested that the Order Granting
25

26 ¹ It should be noted that it is likely that this defense is not preserved under 11
27 U.S.C. § 550(b)(1), providing a defense for transferees that take for value, in
28 good faith and without knowledge of the avoidability of the transfer, since that
section only applies to non-initial transferees. It is likely that Mr. O'Connor is
the initial transferee and is not cloaked with the defenses of 11 U.S.C. § 550(b).

Trustee's Motion for Partial Summary Judgment be altered or amended to provide that any claim by Mr. O'Connor would only be contingently disallowed "unless and until any final judgments obtained by the estate against Mr. O'Connor are satisfied".

III. THE ORDINARY COURSE OF BUSINESS DEFENSE UNDER § 547 IS RELEVANT IN THIS MATTER.

The Trustee has apparently proven the existence of a preference under 11 U.S.C. § 547. However, Mr. O'Connor had lent \$35,000.00 to the Debtor approximately 4 months before the alleged preferential payment and that the payment was made pursuant to the note terms upon which the money was lent. While it is generally claimed that the ordinary course of business exception is not available in ponzi scheme cases pursuant to *In re Bullion Reserve of North America*, 836 F.2d 1214 (9th Cir. 1988), such blanket assertions concerning the inapplicability of the defense is likely no longer the law in the Ninth Circuit. After the *In re Bullion Reserve of North America* case was decided, the United States Supreme Court in *United Bank v. Wolas*, 502 U.S. 151, 112 S. Ct. 527, 116 L ed.2d 514 (1991), rejected the notion that § 547 supports the policy of favoring equal distribution rather than merely discouraging creditors from racing to the courthouse "to dismember the debtor". Thus, § 547 is not an anti-fraud provision and, under *Wolas*, is not aimed exclusively at achieving equality of distribution. *In re American Continental Corp.*, 142 B.R. 894, 900 (D. Az. 1992).

Accordingly, in light of *Wolas*, the District Court for the District of Arizona has rejected a blanket restriction against the ordinary course of business exception in fraud/ponzi scheme cases.

As the *American Continental* Court stated:

The result the estate seeks would effectively put the burden on innocent third parties, who were fortunate enough to have been paid, to defend against alleged fraud at ACC. Although it is inequitable for certain creditors to retain their payments, while others go unpaid, it is far more inequitable to penalize those who are paid, for an alleged fraud that was not their doing, and by which they may have already been substantially damaged.

Accordingly, it is the finding of this court that these payments are entitled to the protection of Section 547(c)(2) ordinary course of business exception.

Id. Thus, the knowledge and intent of Mr. O'Connor is relevant to the applicability of the § 547(c)(2) ordinary course of business exception – if there was knowledge of the fraud being

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1 perpetrated by the Debtor, the exception would be inapplicable. If, however, Mr. O'Connor was
2 an innocent third party with no knowledge of this fraud, the ordinary course of business exception
3 would be relevant and applicable to this matter. The Trustee has not come forward with any
4 evidence that Mr. Brown was aware of, or in any way participated in, this fraud. As such, the
5 Motion for Summary Judgment should be denied, a new trial granted and an evidentiary hearing
6 held on Mr. O'Connor's knowledge of this fraud and whether the protections of § 547(c)(2)'s
7 ordinary course of business exception is available to him.

8 DATED this 26th day of December, 2000.

9 JABURG & WILK, P.C.



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14 COPY of the foregoing mailed on
15 this 26th day of December, 2000 to:

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